No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 55 national and international labor organizations with a total membership of 12.5 million working men and women.[1] This case addresses the constitutionality of contract clauses that require public employees who benefit from union representation to share the costs of negotiating and enforcing their collective bargaining agreements. A number of AFL-CIO affiliates represent public employees and negotiate collective bargaining agreements containing clauses that require the covered employees to financially support collective bargaining.

SUMMARY OF ARGUMENT

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court held that public employees may be compelled to subsidize their union representative's participation in the collective bargaining system by which their terms of employment are set. The Court also held that employees may not be compelled to subsidize their union's political or ideological ac-

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[1] Counsel for the petitioner and counsel for the respondents have consented to the filing of *amicus* briefs. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

tivities unrelated to collective bargaining. The plaintiff challenges the distinction drawn in *Abood* and maintains that compelled subsidization of collective bargaining activities is indistinguishable for purposes of First Amendment analysis from compelled subsidization of political or ideological speech unrelated to collective bargaining.

Abood is one in a long line of compelled-subsidy cases decided by this Court. The compelled-subsidy cases involve a variety of situations in which the government mandates that individuals participate in an association for the purpose of advising the government on a program affecting those individuals. The compelled-subsidy analysis employed in those cases allows the government to require that members of the advisory association financially subsidize the association's participation in the government program. The fact that the association's representation of the members' interests often involves speech directed to the government does not make the compelled subsidization a violation of the First Amendment, because the subsidized speech is germane to the legitimate government program that justified mandating the formation of the association in the first place.

In challenging the distinction drawn in *Abood*, the plaintiff ignores altogether the applicable compelled-subsidy analysis and instead relies solely on cases involving either compelled speech or compelled expressive association. The compelled-speech and compelled-association cases, however, are concerned with direct government interference with individuals' self-expression, either by compelling them to convey a particular message or by compelling

them to associate with others with whom they disagree in a way that affects their ability to convey their own message. Neither of those concerns arise in the compelled-subsidy cases, because individuals are not forced to convey any message nor are they personally associated with any message in a way that affects their ability to express themselves.

First Amendment concerns do arise in the compelled-subsidy context where the mandated association uses compelled subsidies to support speech that is unrelated to the government's regulatory program. To address this concern, the Court has held that compelled subsidization of association speech that occurs outside of the government program is permissible only to the extent that the governmental interests in compelling subsidization outweigh the First Amendment interests of association members who object to the speech. This Court's decisions regarding the use of agency fees to support union lobbying activities are an example of this. The Court has held that public employees may not be compelled to subsidize union lobbying activity except to the extent necessary to secure legislative ratification of a collective bargaining agreement. The plaintiff denies that there is any First Amendment difference between collective bargaining and union lobbying, but this Court's decisions explain the relevant differences and their significance for purposes of the First Amendment.

The plaintiff's objection to *Abood* is nothing less than a full-scale challenge to this Court's entire line of compelled-subsidy cases. By denying the distinction drawn in *Abood* between compelled subsidization of collective bargaining and compelled subsidi-

zation of political or ideological speech unrelated to collective bargaining, the plaintiff denies a distinction that underlies the decisions in all of the compelled-subsidy cases. In conducting an assault on this established aspect of the Court's First Amendment jurisprudence, the plaintiff makes no attempt to come to grips with the Court's compelled-subsidy analysis and instead relies upon a line of compelled-speech/compelled-association cases that address significantly different free speech concerns.

ARGUMENT

In *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 211 (1977), the Court held that requiring public employees to pay a service charge—or agency fee—to their union representative does not violate the First Amendment "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment." *Id.* at 225. At the same time, the Court also held "that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative" to the extent those "expenditures [are] financed from charges, dues, or assessments paid by employees who . . . object to advancing those ideas." *Id.* at 235-36.

The plaintiff in this case challenges "the basic distinction drawn in *Abood*," between "'preventing compulsory subsidization of ideological activity by employees who object thereto'" and "'requir[ing] every

employee to contribute to the cost of collective-bargaining activities.'" *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 (1986), quoting *Abood*, 431 U.S. at 237. It is the plaintiff's position that there is no such distinction and that requiring financial support for collective bargaining activities is no different in First Amendment terms than requiring financial support for ideological expression unrelated to collective bargaining.

In challenging the distinction drawn in *Abood*, the plaintiff calls into question not just the holding of that case but the holdings in all of this Court's "compelled-subsidy cases" in which "*Abood* and *Keller* [*v. State Bar of California*, 496 U.S. 1 (1990),] 'provide the beginning point for [the Court's] analysis.'" *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 559 (2005), quoting *Board of Regents of the Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 230 (2000). "[T]he compelled-subsidy analysis" drawn from *Abood* and *Keller* "differs substantively" from the "compelled-speech" analysis on which the plaintiff relies in challenging *Abood*. *Id.* at 565 n. 8. Under the "compelled-subsidy" analysis, "an individual [may be] required by the government to subsidize a message he disagrees with, expressed by a private entity," to the extent that the message is "germane to the regulatory interests" of the government. *Id.* at 557-58.

There is no question that union communications "for the purposes of collective bargaining, contract administration, and grievance adjustment," *Abood*, 431 U.S. at 225, are "germane to the regulatory interests" of the government, *Johanns*, 544 U.S. at 558, in negotiating the terms of public employment. Thus,

under the applicable "compelled-subsidy analysis," the plaintiff's challenge to "the basic distinction drawn in *Abood*," *Hudson*, 475 U.S. at 302, fails.

I. COMPELLED SUBSIDIZATION OF A PRIVATE ASSOCIATION THAT HAS BEEN MANDATED IN ORDER TO FURTHER A LEGITIMATE GOVERNMENT INTEREST IS NOT A FORM OF COMPELLED SPEECH SUBJECT TO HEIGHTENED FIRST AMENDMENT SCRUTINY.

A. Compelled Subsidization of Private Speech that is Germane to Legitimate Government Regulatory Interests.

The compelled-subsidy cases involve various situations in which "compelled association . . . [is] justified by the [government's] interest in regulating" aspects of a particular population's activities or relationships. *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990). The issue of "compelled association" arises where the government decides to allow "a large measure of self-regulation" by mandating association among members of the regulated community for the purpose of allowing them to advise on "regulation conducted by a government body." *Id.* at 12. For example, public employers frequently provide for employee input on their terms of employment through a system of exclusive representation. Or, to take another "substantial[ly] analog[ous]" example, state courts often require practicing lawyers to join an integrated bar association that "provide[s] specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Id.* at 12 & 13.

In all of the compelled-subsidy cases, "there is some state imposed obligation which makes group membership less than voluntary" that is justified by "the legitimate purposes of the group [that are] furthered by the mandated association." *United States v. United Foods, Inc.*, 533 U.S. 405, 413-14 (2001). The advisory process inevitably involves speech by the association that is directed toward the government regulator, but compulsory subsidization of that advisory speech does not violate the First Amendment, so long as "objecting members [a]re not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association." *Id.* at 414.

The earliest compelled-subsidy cases involved collective-bargaining agreements that require covered employees to pay fees equal to union dues and integrated bar associations that require membership as a condition of practicing law. In *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 235 (1956), the Court sustained the Railway Labor Act's authorization of union shop agreements against a First Amendment challenge on the ground that, although "[t]o require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course[,] Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce." Treating *Hanson* as controlling First Amendment authority, the Court later held that a state "may constitutionally require that the costs of improving the [legal] profession [with the advice of the integrated bar] be shared by the subjects and beneficiaries of the regulatory program" so long as the State "might reasonably believe"

that the requirement "further[s] the State's legitimate interests." *Lathrop v. Donahue*, 367 U.S. 820, 843 (1961). *See also id.* at 849 (concurring opinion).[2]

When the Court returned to these two forms of compelled subsidization in *Abood* and *Keller*, it began to define the limits of what is constitutionally permissible. *Abood* held that a public employer may require its employees to subsidize the costs of collective bargaining on their behalf but not of "ideological activities unrelated to collective bargaining." 431 U.S. at 225-26 & 236. Applying *Abood* to the integrated bar, *Keller* held that a state may require practicing attorneys to subsidize only those "expenditures [that] are necessarily or reasonably incurred for the purpose of regulating the legal profession." 496 U.S. at 14. In *Keller*, the bar association argued that *Abood* should not apply, because it was possible to "distinguish the two situations on the grounds that the compelled association in the context of labor unions serves only a private economic interest in collective bargaining, while the State Bar serves more substan-

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[2] Seven Justices in *Lathrop* voted to affirm the decision of the Wisconsin Supreme Court upholding the constitutionality of the integrated bar—six on the basis of *Hanson*, 367 U.S. at 842 & 849. Justice Whittaker concurred on separate grounds. *Id.* at 865. Justice Black agreed that "the question posed" by the "integrated bar" is "identical to that posed" by the union shop, but he dissented on the ground that both are unconstitutional. *Id.* at 871. Only Justice Douglas disputed that the integrated bar and union shop presented analogous constitutional questions, and he maintained that the union shop, unlike the integrated bar, was constitutional based on "[t]he power of a State to manage its internal affairs by requiring a union-shop agreement." *Id.* at 879.

tial public interests." *Id.* at 13. The Court rejected that argument, explaining, "We are not possessed of any scales which would enable us to determine that the one outweighs the other sufficiently to produce a different result." *Ibid.* Taken together, "*Abood* and *Keller* provide the beginning point for [the] analysis" in the "compelled-subsidy cases." *Johanns*, 544 U.S. at 559 (quotation marks and citation omitted).

"[T]he rule announced in *Abood* and further refined in *Keller*" was applied in reviewing the system by which producers advise the Secretary of Agriculture regarding marketing orders issued pursuant to Agricultural Marketing Agreement Act of 1937. *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 473 (1997). *See also id.* at 478 (dissenting opinion) ("[A] proper understanding of *Abood* is necessary for the disposition of this case."). "The orders are implemented by committees composed of producers and handlers of the regulated commodity, . . . who recommend rules to the Secretary governing marketing matters such as fruit size and maturity," *id.* at 462, and "impose assessments on [producers] that cover the expenses of administering the orders," *id.* at 460. "Given that producers were bound together in the common venture" by the marketing orders, the Court held that "the imposition upon their First Amendment rights caused by using compelled contributions . . . was, as in *Abood* and *Keller*, in furtherance of an otherwise legitimate program." *United Foods*, 533 U.S. at 414-15. Accordingly, "*Abood* and *Keller* would permit the mandatory fee if it were 'germane' to a 'broader regulatory scheme,'" *Johanns*, 544 U.S. at 558, quoting *United Foods*, 533 U.S. at 415, that was "judged by

Congress to be necessary to maintain a stable market," *United Foods*, 533 U.S. at 414.

In each of these situations, the government could have dispensed altogether with any "measure of self-regulation" and provided for unilateral "regulation conducted by a government body." *Keller*, 496 U.S. at 13. Public employers often unilaterally set the terms of public employment. And, even if some employee input were desired, the government could provide for "bargaining carried on by the Secretary of Labor," or some other publicly appointed figure, rather than representation by an independent labor union. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 552 (1991) (Scalia, J., concurring in part and dissenting in part), quoting *Machinists v. Street*, 367 U.S. 740, 787 (1967) (Black, J., dissenting). By the same token, "a state legislature could set up a staff or commission to recommend" rules governing the practice of law. *Lathrop*, 367 U.S. at 864. And, the Secretary of Agriculture could conduct his own "research and development projects" to determine the "rules . . . governing marketing matters," without the advice of "committees composed of producers and handlers." *Glickman*, 521 U.S. at 461-62.

In each instance, were the government to choose to seek advice from a source other than the affected individuals, it could obviously impose "a reasonable license tax," *Lathrop*, 367 U.S. at 865, to "require that the costs of [procuring the advice] be shared by the subjects and beneficiaries of the regulatory program," *Keller*, 496 U.S. at 8, without raising any serious First Amendment question. In the variety of different contexts addressed in the compelled-subsidy

cases, the Court has held that the government may likewise seek advice on its program from the affected group of individuals and may require the group to share the cost of giving that advice.

Finally, in considering a closely related "First Amendment challenge to a mandatory student activity fee imposed by . . . the University of Wisconsin System and used in part by the University to support student organizations engaging in political or ideological speech," the Court treated "[t]he *Abood* and *Keller* cases [as] provid[ing] the beginning point for our analysis." *Southworth*, 529 U.S. at 221, 230. The University could have financed the "program designed to facilitate extracurricular student speech" itself but instead chose to "charge its students an activity fee used to fund [the] program." *Id.* at 220-21. Nevertheless, applying "the constitutional rule" from "*Abood* and *Keller*," the Court held that "a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech of other students," based on the University's "determin[ation] that its mission is well served if students have means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." *Id.* at 231, 233.

The compelled-subsidy line of cases stands for the proposition that, so long as the state "might reasonably believe" that mandated association will further "a legitimate end of state policy," it "may constitutionally require that the costs of [association] should be shared by the subjects and beneficiaries of the regulatory program." *Lathrop*, 367 U.S. at

843. *Accord Southworth*, 529 U.S. at 233 ("If the University reaches this conclusion [that its mission is well served if students have the means to engage in dynamic extracurricular discussions], it is entitled to impose a mandatory fee to sustain an open dialogue to these ends."). Thus, "using compelled contributions . . . in furtherance of an otherwise legitimate program" does not violate "the First Amendment rights" of those who are "required to pay moneys in support of activities that [a]re germane to the reason justifying the compelled association in the first place." *United Foods*, 533 U.S. at 414-15. *Accord Johanns*, 544 U.S. at 565 n. 8 (the First Amendment is violated only by compelled-subsidy of speech "unconnected to any legitimate government purpose").

B. The Reasoning of the Compelled-Speech Precedents Applies Only to Compelled Subsidization of Private Speech that is Not Germane to Legitimate Government Regulatory Interests.

The plaintiff maintains that compelled subsidization of a public sector union's core collective bargaining activities should be subjected to the same level of scrutiny as that employed in cases of "compelled speech" or "compelled association." Pet. Br. 19-20. However, the heightened level of First Amendment review in the cases on which plaintiff relies "relates to compelled *speech* rather than compelled *subsidy*." *Johanns*, 544 U.S. at 564-65 (emphasis in original). And, as the Court has explained, the First Amendment concerns regarding "compelled speech" or "compelled association" are not implicated in

"compelled subsidy" of private speech within a legitimate government program.

"[T]rue 'compelled-speech' cases" involve situations "in which an individual is obliged personally to express a message he disagrees with, imposed by the government." *Johanns*, 544 U.S. at 557. This "line[] of precedent . . . exemplified by *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977), stands for the principle that government may not force individuals to utter or convey messages they disagree with or, indeed, say anything at all." *Id.* at 573 (dissenting opinion).

The "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message," they "have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006), citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 566 (1995) (state law cannot require a parade to include a group whose message the parade's organizer does not wish to send); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U. S. 1, 20-21 (1986) (plurality opinion); accord, *id.* at 25 (Marshall, J., concurring in judgment) (state agency cannot require a utility company to include a third-party newsletter in its billing envelope); *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 258 (1974) (right-of-reply statute violates editors' right to determine the content of their newspapers). "The compelled-speech violation in [the forced hosting or accommodation] cases, however,

resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld*, 547 U.S. at 63.

The First Amendment problems identified by the compelled-speech cases do not arise in the compelled-subsidy cases, because the mandated self-regulatory associations "impose no restraint on the freedom of any [individual] to communicate any message to any audience" and "do not compel any person to engage in any actual or symbolic speech." *Glickman*, 521 U.S. at 469. Nor do the mandated associations require any covered individual to take any action "that makes them appear to endorse the [subsidized] message." *Johanns*, 544 U.S. at 565 n. 8. In these very important regards, the types of mandatory association at issue in the compelled-subsidy cases are completely unlike partisan political patronage, which causes individuals to "feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 (1990).

"The reasoning of these compelled-speech cases has been carried over to certain instances in which individuals are compelled not to speak, but to subsidize a private message with which they disagree." *Johanns*, 544 U.S. at 557. With regard to "speech with . . . content [that is] not germane to the regulatory interests that justified compelled membership," the Court has held that "making those who disagree[] with [the content] pay for it violate[s] the First Amendment." *Id.* at 558. This is so, because "being forced to fund someone else's private speech *unconnected to*

any legitimate government purpose violates personal autonomy." *Id.* at 565 n. 8 (emphasis added), citing *id.* at 557-58 ("discussing *Keller* and *Abood*"). This First Amendment concern is fully addressed by the rule "that the objecting members [a]re not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association." *United Foods*, 533 U.S. at 414. *See Southworth*, 529 U.S. at 231 ("In *Abood* and *Keller*, the constitutional rule took the form of limiting the required subsidy to speech germane to the purposes of the union or bar association.").[3]

The core holding of *Abood* is that public employees can be compelled to subsidize the cost of collective bargaining with their employer. The speech entailed in such collective bargaining is most certainly "'germane' to a 'broader regulatory scheme'" for establishing terms of public employment. *Johanns*, 544 U.S. at 558, quoting *United Foods*, 533 U.S. 415-16. Thus, compelled subsidization of collective bargaining is *not* an instance of employees "being forced to fund someone else's private speech unconnected to any legitimate government purpose." *Id.* at 565 n. 8. Accordingly, the core holding of *Abood* is fully consistent with this Court "compelled-subsidy analysis." *Ibid.*

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[3] This rule was applied in *Knox v. Service Employees*, 567 U.S. ___ (2012), in deciding "whether the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union's political and ideological activities." Slip op. 1. *See id.* at 9-10 (discussing *United Food*'s treatment of "compulsory subsidies for private speech" that is unrelated to "a comprehensive regulatory scheme").

II. *ABOOD* REPRESENTS A SOUND APPLICATION OF COMPELLED-SUBSIDY ANALYSIS TO PUBLIC SECTOR COLLECTIVE BARGAINING.

The plaintiff advances two reasons that "*Abood* should be overruled":

> "[i] *Abood* was wrongly decided because bargaining with the government is political speech indistinguishable from lobbying the government; [ii] *Abood* is inconsistent with this Court's precedents that subject instances of compelled speech and association to heightened constitutional scrutiny." Pet. Br. 9.

The decisions in this Court's "compelled-subsidy cases," *Johanns*, 544 U.S. at 559, refute both of these assertions.

A. For Purposes of First Amendment Analysis, Collective Bargaining Over Terms of Public Employment is Not Equivalent to Lobbying.

"[T]he principal reason *Abood* was wrongly decided," according to the plaintiff, is that it failed to recognize that "bargaining with the government is political speech indistinguishable from lobbying the government." Pet. Br. 10-11. From the premise that public sector collective bargaining is indistinguishable from lobbying, the plaintiff draws the conclusion that "[a]gency fees thus inflict the same grievous First Amendment injury as would the government forcing individuals to support a mandatory lobbyist or political advocacy group." *Id.* at 12. The plaintiff's

argument rests on the understanding that "lobbying" encompasses any "meeting and speaking with public officials, as an agent of parties, to influence public policies that affect those parties." *Id.* at 11.

By the plaintiff's lights, *all* of this Court's compelled-subsidy cases, not just *Abood*, involved "the government forcing individuals to support a mandatory lobbyist or political advocacy group." Pet. Br. 12. In *Keller*, "[t]he plan established by California for the regulation of the [legal] profession [wa]s for recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to be made to the courts or the legislature by the organized bar." 496 U.S. at 12. *Glickman* involved "committees composed of producers and handlers of the regulated commodity, appointed by the Secretary [of Agriculture], who recommend rules to the Secretary governing marketing matters such as fruit size and maturity levels." 521 U.S. at 462. And, in *Southworth*, the mandatory fee was imposed precisely in order to "support student organization engaging in political or ideological speech." 529 U.S. at 221.

In each of these situations, "the compelled contributions . . . did not raise First Amendment concerns" so long as the "compelled contributions" were "in furtherance of a legitimate program." *United Foods*, 533 U.S. at 415. At the point where "the legitimate purposes of the group were [not] furthered by the mandated association," however, "[a] proper application of the rule in *Abood* require[d] . . . invalidat[ion of] the . . . statutory scheme." *Id.* at 413-14. This Court's decisions in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), and *Harris v. Quinn*, 573 U.S.

___ (2014), represent an application of this rule that squarely rejects the identity between public sector collective bargaining and lobbying drawn by the plaintiff.

In *Lehnert*, this Court distinguished "discussion by negotiators regarding the terms and conditions of employment" from "lobbying and electoral speech . . . concern[ing] topics about which individuals hold strong personal views." 500 U.S. at 521. The Court determined that "allowing the use of dissenters' assessments for political activities outside the scope of the collective-bargaining context would present additional interference with the First Amendment interests of objecting employees," and on this ground held "that the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." 500 U.S. at 521-22 (internal quotation marks omitted). The Court explained that, "unlike collective-bargaining negotiations between union and management, our national and state legislatures, the media, and the platform of public discourse are public fora open to all." *Id.* at 521. The Court also noted that "[t]here is no question as to the expressive and ideological content" of lobbying in these fora, because the "policy choices performed by legislatures is not limited to the workplace but typically has ramifications that extend into diverse aspects of an employee's life." *Ibid.*

By contrast, the negotiation of a collective bargaining does not involve "public discourse [in] public fora open to all" and the subjects of bargaining are "limited to the workplace." *Lehnert*, 500 U.S. at 521.

Collective bargaining involves establishing the terms of employment controlled by the government through negotiations with designated executive branch representatives. *See* 5 ILCS 315/7. Thus, the collective bargaining activities that the employees are compelled to financially support typically "will not seek to communicate to the public or to advance a political or social point of view beyond the employment context." *Borough of Duryea, Pennsylvania v. Guarnieri*, 564 U.S. 379, 398 (2011).

The Illinois Public Labor Relations Act, for example, is typical of public sector bargaining laws in providing that in such "closed bargaining sessions" the government will "admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees." *City of Madison Jt. School Dist, No. 8. v. Wisconsin Emp. Rel. Commn.*, 429 U.S. 167, 178 (1976) (Brennan, J., concurring). *See* 5 ILCS 315. Such sessions are exempt from the Illinois Open Meetings Law. 5 ILCS 120/2(c)(2). And, what occurs at such sessions is exempt from public disclosure under § 7 of the Illinois Freedom of Information Act. 5 ILCS 140/7(1)(p). Illinois law thus shields collective bargaining from public disclosure in the same manner that it shields other types of commercial contract negotiations. *See, e.g.*, 5 ILCS 120/2(c)(5)("purchase or lease of real property") & (c)(7) ("sale or purchase of securities, investments, or investment contracts"); 5 ILCS 140/7(1)(h)("Proposals and bids for any contract, grant, or agreement") & (r)("records, documents, and information relating to real estate purchase negotiations"). *See City of Madison Jt. School Dist.*, 429 U.S. at 175 n. 6 (drawing a distinction of constitu-

tional significance between the school board's "open session where the public was invited" and "true bargaining sessions between the union and the board [] conducted in private").

Indeed, the holding of *Harris v. Quinn*, *supra*, rests entirely on the distinction between lobbying and collective bargaining drawn in *Lehnert*. In *Harris*, the Court determined that allowing compelled-subsidization of a "union [that] is largely limited to petitioning the State for greater pay and benefits," slip op. 32, rather than collective bargaining, would "amount[] to a very significant expansion of *Abood*," *id.* at 8-9. Based on the distinction between lobbying and bargaining, *Harris* "refuse[d] to extend *Abood*" to allow compelled subsidization of union representation that was effectively limited to lobbying. *Id.* at 39. Thus, while the majority opinion in *Harris* criticizes *Abood* in dicta, the holding of that case reinforces "the basic distinction drawn in *Abood*," between "'compulsory subsidization of ideological activity'" and "'requir[ing] every employee to contribute to the cost of collective-bargaining activities.'" *Hudson*, 475 U.S. at 302, quoting *Abood*, 431 U.S. at 237.

B. The Level of First Amendment Scrutiny Generally Applied in Cases of Compelled Speech and Compelled Association Does Not Apply to Compelled Subsidization of Core Collective Bargaining Activities.

The plaintiff more generally criticizes "*Abood*'s failure to apply [the] heightened scrutiny to agency fees" that often applies in cases of "compelled expressive and political association" or "compelled speech." Pet.

Br. 18-19. However, as we have explained in point I, "th[e] compelled-speech [analysis]" on which the plaintiff relies "differs substantively from the compelled-subsidy analysis" that applies to mandatory association in furtherance of a legitimate government program. *Johanns*, 544 U.S. at 565 n. 8.[4]

The compelled-subsidy analysis establishes that the government "may constitutionally require that the costs of [mandated association] should be shared by the subjects and beneficiaries of the regulatory program," so long as the government "might reasonably believe" a mandated system of self-regulation will further "a legitimate end of state policy." *Lathrop*, 367 U.S. at 843. The decision to set the terms of public employment through collective bargaining is certainly "a reasonable position, falling within the wide latitude granted the Government in its dealings with employees." *National Aeronautics and Space Administration v. Nelson*, 562 U.S. 134, 154 (2011) (quotation marks and citation omitted).

To begin with, there is not the slightest doubt that, "[t]o attain the desired benefit of collective bargaining, union members and nonmembers [may be] required to associate with one another" by choosing an exclusive bargaining representative as "the legitimate purposes of the group [a]re furthered by th[at] mandated association." *United Foods*, 533 U.S. at

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[4] In determining whether "unions constitutionally may subsidize lobbying and other political activities with dissenters' fees," the Court has *not* applied exacting scrutiny but rather has balanced "the governmental interests underlying . . . union-security arrangements" against the "burden upon freedom of expression." *Lehnert*, 500 U.S. at 520 & 522.

414. There are strong practical reasons for allowing units of similarly situated employees to choose an exclusive representative in order to avoid "[t]he confusion and conflict that could arise if rival . . . unions, holding quite different views as to the proper [terms] each sought to obtain the employer's agreement." *Abood*, 431 U.S. at 224.

In *Knight v. Minnesota Community College Faculty Assn.*, 460 U.S. 1048 (1983), the Court summarily affirmed a three-judge district court decision that had "rejected [an] attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment, relying chiefly on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 278 (1984). As the Court explained, "it is rational for the State to give the exclusive representative a unique role in the 'meet and negotiate' process" leading to a collective bargaining agreement, because "[t]he goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when 'negotiating.' See *Abood v. Detroit Board of Education*, 431 U.S. at 224." *Id.* at 291. *See also id.* at 315-16 (Stevens, J., dissenting in part) ("It is now settled law that a public employer may negotiate only with the elected representative of its employees, because it would be impracticable to negotiate simultaneously with rival labor unions.").

"The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones"

that "often entail expenditure of much time and money." *Abood*, 431 U.S. at 221. Precisely because "the union is obliged fairly and equitably to represent all employees . . ., union and nonunion, within the relevant unit," the state could reasonably conclude that requiring all represented employees to contribute "distribute[s] fairly the cost of the[representational] activities among those who benefit, and . . . counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222. On this ground, *Abood* determined that "the permissive use of an agency shop" was a reasonable method of financing exclusive representation. *Id.* at 229. *See also Lathrop*, 367 U.S. at 843 (the state "may constitutionally require that the costs . . . should be shared by the subjects and beneficiaries of the regulatory program").

To the extent that "[t]he reasoning of the[] compelled-speech cases has been carried over to certain instances in which individuals are compelled . . . to subsidize a private message," it has been applied to "invalidate[] the use of . . . compulsory fees to fund speech on political matters" that "was not germane to the regulatory interests that justified compelled membership." *Johanns*, 544 U.S. at 557-58. This application of that reasoning is reflected in "the basic distinction drawn in *Abood*," between "'preventing compulsory subsidization of ideological activity by employees who object thereto'" and "'requir[ing] every employee to contribute to the cost of collective-bargaining activities.'" *Hudson*, 475 U.S. at 302, quoting *Abood*, 431 U.S. at 237.

Abood expressly recognized that "compelled . . . contributions for political purposes" would be "an infringement of [employees'] constitutional rights." *Abood*, 431 U.S. at 234. Accordingly, the Court held that, while "a union [may] constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative . . ., such expenditures [must] be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas." *Id.* at 235-36. While "*Abood* did not attempt to draw a precise line between permissible assessments for public-sector collective bargaining activities and prohibited assessments for ideological activities," *Lehnert*, 500 U.S. at 517, the Court has undertaken to do so with great care in subsequent decisions. *See, e.g., Ellis v. Railway Clerks*, 466 U.S. 435, 448-57 (1984); *Lehnert*, 500 U.S. at 518-32; *Locke v. Karass*, 555 U.S. 207, 217-21 (2009).

The plaintiff cannot deny that the use of compulsory fees to support collective bargaining over economic terms of employment is "the logical concomitant of a valid scheme of economic regulation." *United Foods*, 533 U.S. at 412. Nor can he deny that, for the most part, the "basic distinction drawn in *Abood*," *Hudson*, 475 U.S. at 302, protects him from "being forced to fund someone else's private speech unconnected to any legitimate government purpose." *Johanns*, 544 U.S. at 565 n. 8. Rather, the plaintiff challenges *Abood* primarily on the grounds that, at the margins, "it is difficult to distinguish chargeable from nonchargeable expenses under *Abood*," singling

out for criticism what he refers to as "[t]he amorphous *Lehnert* and *Locke* tests." Pet. Br. 26 & 27.

Whatever one may think about the Court's subsequent attempts to "draw a precise line between permissible assessments for public-sector collective bargaining activities and prohibited assessments for ideological activities," *Lehnert*, 500 U.S. at 517, so long as "the extreme ends of the spectrum are clear," the fact that "where the line falls . . . will not always be easy to discern," *Keller*, 496 U.S. at 15, provides no basis for overruling *Abood*'s core holding that public sector agency shop agreements are constitutional "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment," 431 U.S. at 225. *See Southworth*, 529 U.S. at 232 (upholding compelled subsidization of student speech even though "the vast extent of permitted expression makes the test of germane speech inappropriate").

There is no serious question that, with respect to negotiating economic terms of employment, "the case for requiring [employees] to speak through a single representative would be quite strong," as would be "the case for requiring all [employees] to contribute to the clearly identified costs of collective bargaining," and that "the concomitant limitation of First Amendment rights would be relatively insignificant." *Abood*, 431 U.S. at 263 n. 16 (concurring opinion). While the plaintiff may object to financially supporting bargaining over economic issues, such as, "wage increases" or "health insurance," Pet. Br. 12, he makes no effort to show that the use of agency

fees to support such bargaining is "not germane to the regulatory interests that justif[y] compelled [participation in public sector collective bargaining]." *Johanns*, 544 U.S. at 558. *See* Pet. Br. 12-14 (describing the various subjects of bargaining). *Abood*'s core ruling regarding compelled-subsidy of the cost of collective bargaining thus fits comfortably within this Court's First Amendment jurisprudence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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